United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

76-4151
76-4153

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, et al.

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

POWER AUTHORITY OF THE STATE OF NEW YORK

Intervenor

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REPLY BRIEF OF PETITIONERS GREENE COUNTY PLANNING BOARD AND TOWN OF GREENVILLE ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

October 22, 1976

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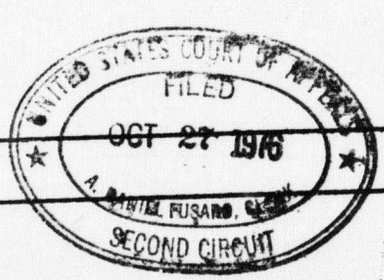

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REPLY BRIEF OF PETITIONERS GREENE COUNTY PLANNING BOARD AND TOWN OF GREENVILLE ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This brief is filed on behalf of Petitioners Greene County Planning Board and Town of Greenville (collectively, "Greene County") in reply to briefs of the Federal Power Commission ("FPC") and Power Authority of the State of New York ("PASNY").

The FPC Orders here for review should be set aside because

the FPC has failed to conduct an overall review of a multi-staged PASNY plan, has failed properly to consider alternatives to that plan and has relied upon data which the FPC knew to be incorrect when relied upon. In the course of making these errors, the FPC also failed to prepare an adequate environmental impact statement and to conduct an administrative hearing in a manner calculated to complile a full Record.

A PRELIMINARY NOTE

The briefs in this case afford this Court an unusual opportunity to understand why this matter has been difficult and protracted. On the one hand, there is the FPC struggling mightily to restrict its responsibilities and narrow its vision. On the other hand, there is PASNY making ad hominem attacks on petitioners' counsel (PASNY br. 25-28)* and raising at length matters completely dehors the Record. (See discussion of PASNY br. 45-47 and footnote beginning at 14.) This has been the persistent pattern of FPC and PASNY behavior throughout this case.

The relevance of the foregoing is this: we perceive a substantial risk to due process from tactics which serve to exhaust the resources of litigants and which tend to exhaust the patience of this Court with Gilboa Leeds line matters. We submit, however, that any instinct this Court

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* See affidavit annexed to this brief.

might have to affirm the FPC orders here brought for review on a theory that there is a purpose to be served by ending litigation should be set aside. Affirmance on a finality theory would only reward those who engage in the behavior reflected in the PASNY and FPC briefs.

This case presents important issues. The determination of these issues will establish the future course of electrical system planning and land use in a large portion of New York State for a decade or more. The constituents of Greene County deserve a decision based upon a full Record, compiled in a fairly conducted proceeding, with rigorous adherence to every law and regulation designed to protect their interests. That is what this case is about and that is why the FPC and PASNY attempts to wear everybody else down must be resisted.

THE FPC and PASNY BRIEFS DO NOT DEAL WITH THE REAL ISSUES IN THIS CASE

The fundamental broad defect in the FPC's handling of this case is that it has attempted impermissably to segment an integrated, comprehensive, multi-staged program into isolated pieces. Rather than dealing with this issue, the FPC and PASNY briefs raise a series of straw men and proceed to knock them down.

We do not argue that the Gilboa Leeds line is not a primary line under the Federal Power Act (compare PASNY br.23), nor do we argue that the Record lacks substantial evidence to prove a "need" (i.e. usefulness) for the line (compare FPC br. 26). What we do argue, and what is quite clearly admitted by both the FPC and PASNY, is that in addition to its primary line function (which appears to be one of its lesser functions), the Gilboa Leeds line (1) will cause, contribute to or result in the construction (for the most part by PASNY) of other related facilities under Federal licenses, applications for which are now pending, and (2) will basically serve a function in the overall state-wide electrical system of providing a method of increasing "transfer capability" (PASNY br. 42) between upstate and downstate New York when electric power usage so requires.

The law, as discussed in our main brief, is quite clear that if a major consequence of a proposal is the likelihood of other construction and/or a variety of functions and related future proposals are used as a

"selling point" for the one under consideration, a proper job of review under both the Federal Power Act and NEPA involves considering the comprehensive or cumulative impact of the whole package at an early time.

This is, to be sure, subject to a rule of reason. In this case the rule of reason springs from the facts that a host of the related facilities (1) are proposed by the same party, i.e. PASNY, (2) in most instances require Federal licenses and (3) are contemporaneously before Federal agencies (i.e. the FPC for all but one, and the Nuclear Regulatory Commission for that one) on applications for license approvals.

In this connection, PASNY's brief proves two of our central points: (a) to understand the "need" for the Gilboa Leeds line you have to look at a lot more than the Blenheim Gilboa Project and (b) to look at that, you must, as PASNY has done at considerable self-serving length, go far outside the narrow (albert voluminous) Record compiled in this case. (See discussion of PASNY br. 45-47 and footnote beginning at PASNY br. 14.)*

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* PASNY also points up the importance of changes in conditions since the Record closed in this case (see e.g. PASNY br. 48). Compare this with pp. 47-51 of our main brief and FPC br. 30-33.

THE FPC'S ATTEMPTED SEGMENTATION IS NOT JUSTIFIED BY THE PRIMARY LINE STATUS OF THE GILBOA LEEDS LINE OR BY ANY FINDINGS AS TO RELIABILITY AND STABILITY

The FPC and PASNY briefs do not deny that the FPC has been guilty of segmentation. Instead, they seek to excuse and justify it.

First, they argue, that since the jurisdiction of the FPC over the Gilboa Leeds line is solely because the line is a primary line to a hydro facility covered by the Federal Power Act, the FPC's analysis of the line can stop with its primary line function. (FPC br. 26, 34) (PASNY br. 35).

Second, they argue, that since the FPC made a finding that the Gilboa Leeds line is needed to insure the reliability and stability of that hydro facility (the Blenheim Gilboa Project), the inquiry can stop at the outer bounds of the project works of that facility. (FPC br. 27-28) (PASNY br. 29).

Neither argument is correct under the Federal Power Act, NEPA or this Court's decision in Greene County I.

1. The FPC's Responsibility To Analyze is Broader Than Its Power To License

As discussed at pp. 35-36 of our main brief, and as held in Greene County I, it has long been the law that the FPC's responsibilities do not stop at issues which determine whether or not the FPC has jurisdiction over a project:

> "The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding." (Scenic Hudson I, 354 F.2d at).

The FPC incorrectly argues in this case:

> "...if and when the line's basic function changes, it may no longer come under Commission jurisdiction", (FPC br. 27) (See also FPC br. 34.)

Therefore, alleges the FPC, the scope and impacts of such other functions need not be examined by the FPC in this proceeding. That is precisely the argument rejected by this Court in Scenic Hudson I and Greene County I.

Once FPC jurisdiction attaches, as it has in this case under the primary line concept, the FPC's responsibility

> "to inquire into and consider all relevant facts" (Scenic Hudson I 354 F.2d at 620).

is as broad as is necessary to permit the FPC to act

> "with a view to the overall cumulative impact of the action proposed, related Federal actions and projects in the area and further actions contemplated." (40 CFR § 1500.b (a)).

2. The Reliability and Stability Finding Expands Rather Than Restricts the Required Scope of Review

The FPC contends (FPC br. 27-29) that since it made a finding that the Gilboa Leeds line is needed to insure the reliability and stability of the Blenheim Gilboa Project,

the line has an independent utility for that project and can be justified and analyzed solely in the context of that project.

This too is incorrect because the concepts of reliability and stability themselves inexorably open up a broader inquiry into overall electrical system planning and proposed related facilities.

Perhaps the clearest explanation in the Record of the reliability and stability role of the Gilboa Leeds line is contained in the testimony of PASNY witness George C. Loehr (tr. 372-395, 873-1137).

On direct testimony Mr. Loehr explained that the design for the Gilboa Leeds line was based upon a mathematical modeling of the bulk power transmission system in New York State (tr. 378). This model included the following key assumptions:

(1) 1974 summer peak loads (tr. 381);

(2) transmission line connections expected to be in existence in the summer of 1974 (tr. 382);

(3) the need to transfer reliably 1000 mw or 2000 mw of electricity from upstate New York to downstate (tr. 383).

Based on these assumptions, Mr. Loehr concluded that when at least 1000 mw of power were being transferred from upstate to downstate New York certain catastrophes occurring on the New Scotland line would cause some Blenheim Gilboa power to be lost to the system if there were no Gilboa Leeds line (tr. 386-387).

Then Mr. Loehr was asked:

> "Q. Does the amount of power transferred across New York State affect these conclusions?
>
> "A. Theoretically, yes..." (tr. 387)

Confirming that the critical issue is not connecting the Blenheim Gilboa Project with the interconnected system but an overall system function, Mr. Loehr further testified as follows:

> "Q. If Gilboa Leeds were not built, would something else be required to increase transfer limits between upstate and downstate?
>
> "A. Yes. Some other circuit or circuits would have to be built to by-pass the bottleneck between New Scotland and Leeds.
>
> "Q. Thus either the Gilboa Leeds line or some equivalent replacement would be required to meet minimum transfer requirements".
>
> "A. That is correct". (tr. 393) (emphasis supplied)*

Mr. Loehr on cross examination pointed out that in designing transmission lines, the "reliability" of getting power where it is supposed to go is the key factor. He defined "reliability":

> "Reliability of the transmission system insures that given the location of the generating sites, the location of the load, and of course, the size of both, and the parameters of the generators and load and transmission grid the generation can be delivered to the load when necessary in order to ... insure that the generating capacity can be delivered to the load". (tr. 941-942)

* PASNY admits in its brief (see footnote, PASNY br. 32) that it has already installed a partial alternative to the Gilboa Leeds line to meet these requirements. Witness Loehr pointed to this possibility in his 1971 testimony (tr. 968-969); (see also tr. 960).

Mr. Loehr went on to explain that in assessing transfer limits, and reliability "you have to look at a lot of other lines, too", (tr. 941) and that because of transmission limits south of Leeds, a Gilboa Leeds line would not increase transfer capacity between upstate and downstate New York (tr. 992).*

The point of this discussion is not that the Gilboa Leeds line has not been proven to be useful. The point is that the FPC finding that the line is needed for the reliability and stability of the Blenheim Gilboa plant is a finding that it is an integral part of an overall scheme including numerous other facilities, many of which are proposals for Federal action pending at the same time. The attempt in the FPC and PASNY briefs to treat this finding as to reliability and stability as a finding of "independent utility" is a distortion of the Record.

The reliability and stability finding itself commands that the FPC launch a broader review than it has made in this case.

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* As conceded by PASNY, if the Gilboa Leeds line is built, additional transmission south of Leeds will be required to make it totally functional. (PASNY br. 40,42) (See also tr. 3155-3156 where plans for this connected line are discussed.) At p. 31 of its brief PASNY admits that the impact of the Gilboa Leeds line

> "will of course depend on circumstances at a given time, e.g., what the system load is, what generation may happen to be down and what system transmission lines are out of service".

3. The Indian Lookout Case Cited By the FPC Does Not Support Its Conclusion

On the segmentation issue, the FPC puts central reliance on the Eighth Circuit case of Indian Lookout Alliance vs. Volpe, 484 F.2d 11 (8th Cir. 1973) (FPC br. 41-43). That case does not reflect the law of this Circuit, nor does it justify the FPC's admitted segmentation in this case.

First, since 1973 this Court's treatment of the segmentation issue has been markedly different than the position of the Eighth Circuit (NRDC vs. NRC, - F.2d -, 6 ELR 20513 (2d Cir. 1976); Conservation Society of Southern Vermont vs. Secretary of Transportation, 508 F.2d 977 (2d Cir. 1974), vacated and remanded for further consideration 96 S.Ct. 19 (1975); on remand 531 F.2d 637 (2d Cir. 1976); NRDC vs. Callaway, 524 F.2d 79 (2d Cir. 1975); and Chelsea Neighborhood Associations vs. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975), and this Court has found the Indian Lookout case of limited persuasion.

Second, the Indian Lookout case presented facts substantially different than this case. There, under attack was a wholly conceptual 20 year plan by a state government for a statewide transportation scheme. Here, specific applications for Federal licenses for specific facilities are all contemporaneously pending. (See p. 37 of our main brief.) This distinction was most recently made by this Court in NRDC vs. NRC, supra, 6 ELR at 20522-20523 involving a licensing

situation. We think that the discussion in NRDC vs. NRC, supra, amply disposes of any argument in this case in this Court based on Indian Lookout as well as PASNY's argument based on SCRAP II (Aberdeen & Rockfish R.A. vs. SCRAP, 422 U.S. 298 (1975). (PASNY br. 58-60)

As pointed out in our main brief (p. 36-38), the U.S. Supreme Court's most recent ruling on the segmentation issue Kleppe vs. Sierra Club, U.S. , 49 L. Ed. 2d 576 (1976), is in accord with this Court's most recent holdings on the subject in NRDC vs. NRC, NRDC vs. Calloway and Chelsea Neighborhood. This instant case is precisely the type of case the Supreme Court had in mind when it pointed out in the Kleppe case of the appropriateness of

> "...a comprehensive impact statement in certain situations where several proposed actions are pending at the some time... (49 L. Ed. 2d at 590).

Since there has neither been a comprehensive impact statement, nor has there been any other overall review in the Record of this case of the effects of all of the related pending Federal actions, FPC Orders 751 and 751A must be set aside.

THE DEC AND EPA DEFICIENCY LETTERS ARE PERSUASIVE EVIDENCE OF THE INADEQUACY OF THE ENTIRE FPC PROCESS

The fact the agencies, at both the state and Federal level, primarily responsible for environmental protection found the DES too deficient even to be commented upon is a devastating and irrefutable reality confronting the FPC and PASNY. Naturally, but unpersuasively, the FPC and PASNY try to deflect the force of these position papers.

The FPC and PASNY both argue that the EPA and DEC positions were appropriately ignored by the FPC because (1) the DEC letter was not addressed in the first instance to the FPC (FPC br. 8, 40; PASNY br. 72), (2) the EPA did comment on the FES after it was published (FPC br. 8, 40; PASNY br. 72), (3) a DES is not subject to scrutiny in a court (FPC br. 39), and (4) the entire issue of DES and FES sufficiency is foreclosed by this Court's decision in Greene County II (FPC br. 59).

1. The DEC Letter Was Properly Before The FPC

The DEC letter concluding that the DES and the FPC policy of segmentation

> "... is an injustice to the basic letter and spirit of intent of the National Environmental Policy Act of 1969..."

was transmitted to the FPC on May 3, 1973, (R. 6589-6593) in ample time for inclusion in the FES.

The fact that in the first instance the DEC letter was addressed to the NYSPSC rather than the FPC should be of no consequence because the FPC staff included in the FES a number of letters addressed to others but only when those letters agreed with staff's prejudices in this matter. Thus, the FES at page 265 included a May 4, 1973 letter from EPA to PASNY! Likewise, at page 305 appears a letter from the New York State Department of Transportation to DEC.

The inescapable inference is that the DEC letter, written by its First Deputy Commissioner, was omitted from the FES and covered up because it was highly critical, it raised hard questions and it required a considerable amount of work by the FPC staff if its points were to be responded to. It cannot be swept aside.

2. EPA Did Not Change Its Mind

As pointed out in our main brief, the EPA pointedly and expressly denied that it had changed its mind concerning the gross inadequacy of the DES stating in its May 27, 1973 letter:

> 'Our comments on that statement have not been withdrawn and remain for consideration of the Federal Power Commission".

EPA consistently maintained that the DES was too poor even to be commented upon and improperly segmented the pending proposals for review.

The June 22, 1973 EPA letter commenting upon the FES and not the DES was discussed by Judge Manfield in dissent in Greene County II:

> "The foregoing major deficiency in the draft statement was not cured in the final impact statement, for in commenting on the final statement the EPA, in its June 22, 1973 letter to the FPC, noted that one of its primary concerns remained unanswered, viz., the cumulative effects of the Blenheim Gilboa and the Breakabeen projects on the water resources of the area. The letter states that because the Gilboa Leeds line is needed to support the Blenheim Gilboa project, the EPA no longer insists on one comprehensive impact statement for both but, although it is willing to have the cumulative effect of the two pumped storage facilities assessed in the draft statement for the Breakabeen project, '(a)n environmental impact statement which does not discuss the cumulative impact of the two facilities will, in our opinion, be seriously deficient.'
>
> "The last quoted statement accords with the earlier order of this court. However, the willingness to defer the comprehensive statement is in direct conflict with it. By failing to issue a comprehensive impact statement for the purpose of the hearing then underway, the FPC disregarded the clear mandate of this Court. Its departure from the mandate is further compounded by the fact that the impact statements gave little attention to the proposed base load generating plant to be constructed near the terminus of the Leeds line. Once again the FPC appears to be cutting back on its responsibility by 'blinding itself to potential developments'". 455 F.2d at 424

EPA did not change its mind. Its criticism of the FPC's segmentation policy stands.

3. The DES Is Open to Court Scrutiny

Although NEPA makes no mention of "draft" statements, the technique of preparing a draft is a common one used by Federal agencies to comply with the requirement of NEPA that they

> "... shall consult with and obtain the comments of any Federal agency wich has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of the comments and views of the appropriate Federal, State and local agencies,... shall be made available to the President. The Council on Environmental Quality and to the public... and shall accompany the proposal through the existing agency review processes; (Emphasis supplied). (4Z U.S.C. §4332(2)(c)).

If an agency, such as the FPC, choses to use the draft statement device as a way of complying with the consulting and commenting mandates of NEPA, then the adequacy of the draft should be subject to review in this Court to measure FPC compliance with that mandate.

As has been pointed out:

> "A statement which is well-developed and presents usuable data is much easier for an analyst to review than a statement which is so opaque and uniformative that the commentator must essentially start from scratch himself, collecting or producing the basic data. Thus, the quality of the comments on an impact statement is frequently proportional to the quality of the statement being commented upon. This is a new and sad variation of the old precept of garbage in, garbage out. (Macbeth, "The National Environmental Policy Act After Five Years", 2 Columbia Journal of Environmental Law 17 (1975).

Therefore, the adequacy of the DES is before this Court on the question of whether or not the FPC has fulfilled its consulting and commenting responsibilities. That it has not is amply reflected in the DEC and EPA deficiency letters.

4. Greene County II Expressly Left Open the DES and FES Adequacy Question

Greene County II dismissed a petition for review only for lack of finality of the orders sought to be reviewed, expressly leaving open the DES and FES adequacy question:

> "... there can be no final appealable order until some decision has been handed down by the administrative hearing officer and/or the FPC. At that time the adequacies or deficiencies of the EIS...can be argued". (490 F.2d at 258)

Neverthless, the FPC and PASNY point to language in Greene County II finding some procedural compliance with NEPA and Greene County I (FPC br. 39). The only thing this language does, however, is to hold that the FPC had improved its position so that it was beyond the Greene County I situation where the total absence of any Federal environmental statement permitted this Court to decide the case even before a decision on the merits in the FPC administrative proceeding.

In Greene County II, on the other hand, all this Court did was to rule that the FPC's general procedures with respect to who prepares an environmental statement

and at what point in the processes complied with NEPA. This Court in Greene County II carefully refrained from commenting on the adequacy of the contents of the DES and FES. That issue was expressly saved for this instant occasion.

5. Both the DES and FES Were Grossly Deficient

The inadequacies of the FPC's environmental statements are amply discussed in our main brief (pp. 52-61). One point, however, deserves further mention.

The FPC admits (FPC br. 47) that it did not review system alternatives asserting

> "... possible system alternatives to the line approved by the Commission have little, if any, relevance".

The reason for this according to the FPC is that a system alternative is not a total equivalent to a Gilboa Leeds line. This same argument was made by the Department of Interior in NRDC vs. Morton, 458 F.2d 827 (D.C. Cir. 1972) and rejected:

> "Nor is it appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem" (458 F.2d at 836)

This Court also has ruled:

> "... The EIS must nevertheless consider such alternatives to the proposed action as may partially or completely meet the proposal's goal and it must evaluate their comparative merits". (Emphasis supplied) (NRDC vs. Callaway, supra, 524 F.2d at 93).

While we do not concede that there are no alternatives that meet totally the purposes to be served by the Gilboa Leeds line, we submit that the out of hand rejection of what the FPC admits to be partial alternatives is improper.

For all of the reasons previously set forth, the FPC violated NEPA in this case by failing to prepare adequate environmental statements.

CONCLUSIONS

FPC orders 751 and 751A must be set aside. On remand the FPC must (1) prepare a comprehensive environmental statement and consider programmatic alternatives, and (2) reexamine how the comprehensive plan for the use of the Schoharie waterway (which the Gilboa Leeds line is allegedly a part of), approved as it was upon the representations that there would be no further hydro plants, 150 foot right of ways to New Scotland and Fraser/ and use of hydro power upstate, is affected by the proposals to build additional plants on that waterway, the acquisition by PASNY of 400 foot right of ways to New Scotland and Fraser and the use of the entire Blenheim Gilboa Project basically to supply power downstate.

October 22, 1976

Respectfully submitted,

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STATE OF NEW YORK)
) SS
COUNTY OF WARREN)

ROBERT J KAFIN, being duly sworn, deposes and says:

(1) I am a member of the bar of this court and am the attorney for the Petitioners Greene County Planning Board and Town of Greenville.

(2) I make this affidavit in response to unsworn to, and wholly outside the Record, allegations by the Power Authority of the State of New York on pages 25-28 of its brief in No. 76-4151 (a) that I have no authority to act on behalf of my named clients and (b) that in reality I am the attorney for the "Tri-County Power Line Association", which is allegedly acting in the name of the Greene County Planning Board and Town of Greenville.

(3) I filed the Petition for Review in this case in the name of the Greene County Planning Board at the express direction of William White, the chairman of the board, and in the name of the Town of Greenville at the express direction of Andrew H. Macko, supervisor of the Town of Greenville. Throughout this case I have taken my instructions and directions only from them.

(4) The petition was filed following weeks of discussions with representatives of the Greene County Planning Board and the Town of Greenville as to the future possible legal courses

of action in this matter and the expense of taking such action.

(5) They are and have been my only clients in connection with the petition for review herein.

(6) Since 1971 I have worked on behalf of the Greene County Planning Board and the Town of Greenville (and sometimes the Town of Durham) on a variety of matters related to the Gilboa-Leeds line. Each time, my clients have asked that I set a fixed fee in advance for that portion of my work. Each time I agreed that for the designated work, my clients would have no liability for any legal expenses beyond the fixed fee I set in advance. The exact procedure has been followed on the petition for review herein. I set my fee before the petition for review was filed and that is the limit of my clients' exposure.

(7) Since 1971 the Greene County Planning Board and the Town of Greenville have paid my various fees, upon information and belief, from a variety of funding sources, including private contributions, Federal and state grants and general revenues raised through local taxes. It is my understanding that my fee this time will be paid with funds raised through private contributions and that funds were set aside in escrow for this purpose before I was authorized to file the petition for review herein.

(8) Nevertheless, it is my arrangement with the Greene County Planning Board and the Town of Greenville that, regardless of the source of funds, I am to take my directions in

this case solely from them and represent only them herein. In this connection it should be pointed out that the motion for a stay pending appeal which I made, and which this Court has granted, was made at the express insistance of the Chairman of the Greene County Planning Board.

(9) My private relationship with my clients should not be an issue in this case and in no way impairs their standing or other qualification before this court.

Robert J. Kafin

Sworn to before me
this 22nd day of October 1976

Notary Public

JACK R. LEBOWITZ
Notary Public, State of New York
Qualified in Warren County
My Commission Expires March 30, 19 74
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